

MCLE ON THE WEB

(\$20 PER CREDIT HOUR)

TEST # 26

1 HOUR CREDIT

LEGAL ETHICS

To earn one hour of MCLE credit in the special category of Legal Ethics, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit

Unbundling: A Hot-Button Ethical Issue *California Joan gives more advice on what offering limited legal services means to lawyers*

By ELLEN R. PECK

"Cali!" exclaimed the unmistakable voice of Polly Person, a Riverside sole practitioner who had recently consulted ethics maven California Joan about ethical issues in expanding her family law practice to include unbundled legal services serving as a lawyer scrivener. "I can't believe a whole month has gone by without talking with you again about how to implement limited legal services as a lawyer scrivener. Can you tell me what risk management principles I should consider in providing these services?"

"Polly, let me begin with some generalities. Offering unbundled or limited legal services is just like expanding your practice to include a new field of substantive law. In both areas, important risk management tools are to prepare substantively to offer the particular legal services, to prepare in advance any forms that you might need to provide the services, to formulate guidelines or office procedures which will help keep you from straying into services that you do not want to offer or perform and to build a routine which will assist you in maintaining quality control of your services," Cali started.

"What is the claims experience in the insurance industry regarding unbundled legal services?" asked Polly.

"My friends in the insurance industry advise me that there have been few if any claims arising solely from delivering unbundled legal services. Be cautious, though. Remember that the insurance industry does not distinguish between limited and 'full-service' representation.

"Moreover, while providing limited legal services has become increasingly common, there has been insufficient time to develop particularized claims experience in this area. The insurance industry has expressed concerns that lawyers providing unbundled services may be held liable for acts and omissions which lie outside the agreed upon scope of representation. (*Report on Limited Scope Legal Assistance with Initial Recommendations*, prepared by the Limited Representation Committee of the California Commission on Access to Justice, October 2001, pp. 23-25 and 42.)

"Gosh Cali, how can we manage the risk if we don't have claims experience?" asked Polly with some alarm.

"We are not shooting completely in the dark. We do have a handful of California appellate published decisions and ethics opinions which give guidance identifying areas of risk in failing to limit the scope of representation properly. We also have some cases discussing risks as a lawyer scrivener and still others discussing risks in failing to make appropriate disclosures in the representation of joint clients for a single purpose," Cali answered.

"Can I ethically limit the scope of my legal services to serving as a scrivener in preparing a marital settlement agreement?" Polly queried.

"Yes," answered Cali. "There is nothing per se unethical about an attorney limiting a professional engagement to one or more unbundled services. (Los Angeles County Bar Association ethics opinions 502 and 483.) As we discussed last time, there are three California cases generally supportive of an attorney's legal services as a scrivener, provided that the clients consent after adequate disclosure. (*Marriage of Egedi*; (2001) 88 Cal.App.4th 17, 105 Cal.Rptr.2d 518. *Blevin v. Mayfield* (1961) 189 Cal.App.2d 649, 11 Cal. Rptr.882; and *Buehler v. Sbardellati* (1995) 34 CalApp.4th 1527, 41 Cal.Rptr.2d 104.)"

Polly then asked, "How do I limit the scope of my legal services in preparing a marital settlement agreement to the lawyer scrivener role?"

"*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687 stated that 'if counsel elects to limit or prescribe his representation of the client . . . then counsel must make such limitations in representation very clear to his client.' Ethics opinions have suggested that the client must be fully informed about and expressly consent to the limited scope of the representation. Any limitations on work to be performed should be stated explicitly and completely. (Los Angeles County Bar Association formal ethics opinions 483 and 502.)

"Does the agreement limiting the scope of the legal services have to be in writing or can it be oral?" asked Polly.

"There is no legal requirement that it be in writing. However, if the fee agreement requires a writing pursuant to Business & Professions Code §6148, then the services to be performed by the lawyer must also be in writing along with the client's responsibilities," Cali responded. (Bus. & Prof. Code §6148(a)(2) & (3); L.A. Co. Bar Ass'n. Form. Op. 502.)

"Also," Cali continued, "if you are going to perform scrivener services for two or more individuals and are required to make written disclosures because of potential or actual conflicts between the parties, describing the limitations of the scrivener role should be part of the written disclosures. (Rules 3-310(A), (C)(1) & (2), Rls. Prof. Cond.)

"There are two important reasons why, even if not required, that the scope of services should be in writing:

"First, to ensure that the scope of your scrivener role is clear, explicitly stated and that the client is fully and completely informed and expressly consents to the limitations. (See *Nichols v. Keller*, supra; L.A. Co. Bar Ass'n. Form. Op. 502.) Even if you have the best oral communications skills in the universe, (1) a writing assists in client comprehension because it repeats what you said about limitations on your representation; (2) rereading gives the client opportunity for further reflection and clarification with you; and (3) a writing provides subsequent memory support for the client.

"Second, as a risk management tool, a writing (1) focuses you upon clarifying the specific legal tasks you want to perform for the client; (2) focuses you upon identification of the limitations upon your representation; (3) will assist you in remembering the limitations on your scope so that you will not stray in performing services outside the scope; and (4) should a dispute arise over the limitations or scope of your services, will provide proof to the client and third parties about the nature and extent of your agreement with the client to limit the scope," Cali finished.

"How should I structure a written 'scope of services' provision?" Polly asked.

"There are generally two structures lawyers use. First, some lawyers providing unbundled legal services prefer to have a checklist defining and outlining specific tasks which the lawyer will perform and those for which the client will have responsibility. A very fine model for this structure is set forth in *A Client's Guide to Limited Legal Services* by Sue M. Talia (1997 San Ramon: Nexus Publishing). Others prefer to set forth the limited scope of their services in traditional prose, particularly when they are limiting their services to one particular area of the law, to a particular remedy (e.g., workers' compensation) or task (e.g., serving as a scrivener to prepare the legal documentation arising out of a business transaction)," answered Cali.

"If I limit the scope of my legal services to a client, am I responsible for performing any services outside of the scope of those services?" Polly asked.

"Yes! A lawyer has a further duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. This duty does not extend to remote or tenuous alternatives, but rather to those that are reasonably apparent.

"The public policy underlying this duty is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. While the lawyer is not required to represent the client on matters outside the scope, the lawyer should inform the client of the limitations of the lawyer's representation and of the possible need for other counsel," Cali explained. (*Nichols v. Keller*, supra, 15 Cal.App. 4th at pp. 1683-1684; *Davis v. Damrell* (1981) 119 Cal.App.3d 883, 889, 174 Cal.Rptr. 257.)

"Can you give me examples of how this would come up in a business transaction or family law matter?" asked Polly.

"Typically, a marital settlement agreement in a family law matter may have tax or estate planning consequences to the parties. The form of the business operation (e.g., an S corporation or a limited partnership) may have tax consequences to individual partners.

"The lawyer is not required to advise about tax estate planning matters, but is required to flag the potential consequence for the client and alert the client to the possible need for other counsel," responded Cali.

"So, I should not only define the scope of my legal services, but also should identify any other legal services that appear to be implicated by the client's matter, outside of that scope, and suggest that they seek counsel on those matters," Polly said.

"Exactly!" Cali responded. "In providing scrivener services, consider the following checklist of issues to integrate into your scope and 'outside the scope' provisions:

- "That the parties have already come to an agreement regarding the terms of a dispute or proposed enterprise; the date upon which they came to that agreement and that the lawyer had no part in the negotiation.

- "That the lawyer's services would be limited to memorializing the parties' agreement in a legal document and encompass only the following tasks: (a) setting forth the terms that had already been agreed to; and (b) adding any standard legal provisions normally found in the type of agreement requested (e.g., marital settlement agreement, general partnership).

■ “That the lawyer would not advise the parties about the consequences the terms would have upon their personal individual interests and that they were encouraged to seek independent counsel to advise them of those consequences.

■ “That the lawyer would not advise the parties jointly about the pros and cons of their agreement and would not negotiate any further terms or provisions of the agreement.

■ “Any areas of law which might be implicated by the agreement about which the lawyer would not advise and which the parties should seek independent counsel. (See *Marriage of Egedi* (2001) 88 Cal. App. 4th 17, 20-24, 105 Cal.Rptr.2d 518.)

“Assuming that I represent two or more people in providing services as a scrivener, what kinds of written disclosures should I give?” asked Polly.

“Let’s start with the rules,” Cali began. “You cannot represent two or more clients on a common matter in which the interests of the clients potentially or actually conflict without the informed written consent of all clients after written disclosure. (Rules 3-310(C)(1) & (2), Rls. Prof. Cond.)

“Disclosure requires the lawyer to inform a client of the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client. Informed written consent is defined as the client’s written agreement to the representation following written disclosure.” (Rule 3-310(A)(1) & (2), Rls. Prof. Cond.)

“Are there typical conflicts which arise between jointly represented clients?” asked Polly.

“Generally, six conflict situations may potentially arise or may already actually exist between the jointly represented clients:

“1. Inconsistent expectations of confidentiality in which one client expects the lawyer not to disclose information the lawyer would be required to impart to the other client.

“2. Conflicting instructions from the clients in which the lawyer cannot follow one client’s instruction without violating another client’s instructions.

“3. Conflicting objectives of the clients in which the lawyer cannot effectively advance one client’s objective without detrimentally affecting another client’s objective.

“4. Advocacy of antagonistic positions of the clients in which the lawyer is called upon to advocate both sides of the negotiation or a legal position at the same time.

“5. A pre-existing relationship with one client that would adversely affect the lawyer’s independent judgment on behalf of the other client.

“6. Conflicting demands by the clients for the original file once the representation has ended. (California State Bar Standing Committee on Professional Responsibility and Conduct formal opinion no. 1999-153 and authorities cited therein.)

Other issues to consider:

■ “Joint clients can have disputes about aggregate settlements, including what the total amount should be or disputes about each client’s proportional share. (Rule 3-310(D), Rls. Prof. Cond.)

■ “Where joint clients are contributing to their joint lawyers’ legal fees and/or costs, potential or actual conflicts can arise concerning whether clients should share equally or proportionally in the payments of fees and costs, and if proportionally, the basis for proportional division (e.g., based upon damage claims or awards, time represented, extent of injury, etc.).

■ “In the event of future arbitration or litigation between the parties and one or both parties desired the lawyer to give evidence, the attorney-client privilege would be waived. (Evid. Code, §962; *Marriage of Egedi* (2001) 88 Cal.App.4th 17, 24, 105 Cal.Rptr.2d 518.)

■ “If one of your clients is an organization, you should ensure that the appropriate disinterested agent consents on behalf of the organization. (Rule 3-600, Rls. Prof. Cond.)

■ “There may be actual or potential conflicts which are unique to your prospective clients’ situation, which you should also include.

“In the initial or subsequent interview, the lawyer should review each of these areas of potential conflict with each client to determine whether any conflicts in these areas are actually present or are only potential. Actual or potential conflicts should then be discussed in writing in terms that can be understood by the client. Many lawyers use the above list as a checklist for both the client discussion and as a template for their written disclosures.”

“Where can I find sample conflict disclosures, Cali?” Polly asked.

“*The Rutter Group’s California Practice Guide — Professional Responsibility*, at the end of Chapter 4 has conflict of interest forms,” she said.

“Are there any other specific disclosures that I should make?” Polly asked.

“Yes! *Marriage of Egedi* [supra, 88 Cal. App. 4th at p. 24, fn 5] suggested that if a lawyer believed that the parties’ agreement is grossly unfair or against public policy, the lawyer should decline to act as a scrivener. This would be a good disclosure to add.

“In holding that the agreement was enforceable, one of the favorable factors was the lawyer’s recitation that the agreement had been entered into voluntarily, free from duress, fraud, undue influence, coercion or misrepresentation of any kind and that the parties were advised in writing to seek independent legal counsel and advice regarding the written disclosure and consent to joint representation and the written agreement prepared by the lawyer. (*Marriage of Egedi*, supra, 88 Cal. App. 4th at pp. 20, 21.) You might consider adding these concepts to your disclosure or even in any agreement you prepare for joint clients,” Cali said.

“Also, remember that if the clients ask you to provide other services, you should memorialize the expanded scope of representation as well as any limitations, in writing, and evaluate whether you need a further disclosure and consent under the conflict rules,” she concluded.

“Cali, you have given me a lot of pointers I need to think about in preparing forms and procedures for providing unbundled legal services as a lawyer scrivener. I’m going to take these general concepts and apply them to my particular practice. While it is going to be some work to get everything ready, I know I will provide better services if I am prepared with forms and procedures to clarify the limitations of my representation to the client and I’ll sleep better at night knowing that I have taken steps to manage the risk of providing unbundled legal services,” Polly said.

“Good luck, Polly, and be careful out there!” Cali said as her friend hung up.

© 2001 and 2002. All rights reserved by Ellen R. Peck. A sole practitioner in Escondido, Peck limits her practice to lawyer law and lawyer professional responsibilities and ethics. She is a co-author of the “*The Rutter Group California Practice Guide — Professional Responsibility*” and a visiting professor on professional responsibility at Concord University School of Law.

Test — Legal Ethics

1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. There is no risk management value to preparing forms, formulating guidelines and office procedures in advance to providing new types of legal services in a lawyer's practice.
2. There have been few if any claims for legal malpractice arising solely from delivering unbundled legal services.
3. A lawyer may not ethically limit the scope of his legal services to serving as a scrivener in preparing a marital settlement agreement.
4. Any limitations concerning the scope of a lawyer's representation should be stated explicitly and completely.
5. Every agreement limiting the scope of the legal services must be in writing.
6. If a lawyer serving as a lawyer scrivener believes that the parties' agreement is grossly unfair or against public policy, the lawyer should decline to act as a scrivener.
7. Giving the client a written statement of the scope of legal services a lawyer intends to provide assists the client in understanding the limitations of the lawyer's services.
8. A lawyer need not advise joint clients seeking scrivener services to seek independent legal counsel and advice regarding any written disclosure and consent to joint representation and any work product prepared by the lawyer.
9. The scope of legal services can be structured in prose text or as a checklist of tasks for which lawyer and client each will be responsible.
10. If the scope of legal services is properly limited, a lawyer is not required to do anything for the client outside of the scope of those services.
11. A lawyer performing a scrivener role in giving legal form to a document may assist the parties in negotiation of the agreement.
12. A lawyer performing a scrivener role may obtain the agreement of the parties to add any standard legal provisions normally found in the type of agreement requested.
13. A lawyer serving as a scrivener must refuse to provide other legal services requested jointly by the clients.
14. A lawyer serving as a scrivener can refuse to advise the parties jointly about the pros and cons of their agreement.
15. Representation of two or more clients as a lawyer scrivener never involves a potential or actual conflict of interest.
16. The conflict rules require oral disclosure only of the relevant circumstances of joint representation in a single matter.
17. Informed written consent is defined as the client's written agreement to the representation following written disclosure.
18. If a lawyer receives conflicting instructions from clients so that the lawyer cannot follow one client's instruction without violating another client's instructions, the lawyer may choose which instruction the lawyer believes is the best.
19. A lawyer has a duty to disclose a pre-existing relationship with one client that would adversely affect the lawyer's independent judgment on behalf of the other client.
20. A lawyer must also disclose to joint clients that in the event of future arbitration or litigation between the parties, and one or both parties desired the lawyer to give evidence, the attorney-client privilege would be waived.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour in legal ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

MCLE ON THE WEB
TEST #26 — Unbundling: A Hot-Button Ethical Issue

1 HOUR CREDIT
LEGAL ETHICS

- Print the answer form only and answer the test questions.
- Mail only form and check for \$20 to:

MCLE ON THE WEB — CBJ
The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (Required)

- | | |
|----------------------|----------------------|
| 1. True___ False___ | 11. True___ False___ |
| 2. True___ False___ | 12. True___ False___ |
| 3. True___ False___ | 13. True___ False___ |
| 4. True___ False___ | 14. True___ False___ |
| 5. True___ False___ | 15. True___ False___ |
| 6. True___ False___ | 16. True___ False___ |
| 7. True___ False___ | 17. True___ False___ |
| 8. True___ False___ | 18. True___ False___ |
| 9. True___ False___ | 19. True___ False___ |
| 10. True___ False___ | 20. True___ False___ |